(3)

Supreme Court, U.S.
FILED
JAN 31 1997
CLERK

No. 96-946

In The

Supreme Court of the United States

October Term, 1996

LAURENCE S. FORDHAM,

Petitioner,

vs.

MASSACHUSETTS BAR COUNSEL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

REPLY BRIEF FOR PETITIONER

HENRY P. MONAGHAN
435 West 116 Street
New York, New York 10027
(212) 854-2644
Of Counsel

JOHN LEUBSDORF
15 Washington Street
Newark, New Jersey 07102
(201) 648-5273
Counsel of Record

DANIEL COQUILLETTE
885 Centre Street
Newton, Massachusetts 02159
(617) 552-8650
Of Counsel

LAURENCE M. JOHNSON
MAHONEY, HAWKES & GOLDINGS
75 Park Plaza
Boston, Massachusetts 02116
(617) 457-3100
Counsel for Petitioner

70121 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

MPP

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

1. Contrary to Respondent's assertion (Brief in Opposition, pp. 7-8), the Petitioner seeks review of one issue only: whether Petitioner was disciplined in violation of the Due Process clause because he had no notice when he acted that his conduct was unlawful. That issue was presented to the Supreme Judicial Court, which squarely rejected Petitioner's claim (Petition, pp. 22a-25a). Petitioner does not argue here, as the Respondent incorrectly asserts (Brief in Opposition, pp. 9-10), that he received no notice in the disciplinary proceedings of the charge against him.

2. The facts in the Petition are those found by the Hearing Committee (Petition, pp. 39a-62a) and the Supreme Judicial Court (Petition, pp. 1a-25a), which rejected none of the Hearing Committee's findings. The only exceptions are a few references--needed to set forth the procedural history of the

proceedings--to the conclusions of the Board of Bar Overseers (pp. 64a-75a) and its Chairman (pp. 27a-38a), and a few references to undisputed facts. Respondent fails to point to a single unfounded or inaccurate factual assertion in the Petition, and Respondent's assertion (Brief in Opposition, pp. 8-9) that Petitioner wishes this Court to make new factual findings is baseless.

3. Equally baseless is Respondent's assertion (Brief in Opposition, p. 8) that Petitioner asks this Court to re-interpret the Massachusetts disciplinary rule. On the contrary, Petitioner's claim is that the Massachusetts Court denied Petitioner Due Process by imposing retroactively on him its own drastic amendment of the law. Several arguments establish that claim:

(a) The Supreme Judicial Court explicitly rejected (Petition, p. 21a) the requirement, recognized by its own disciplinary decisions--which the Court did not discuss--and by authority throughout the nation, that dishonesty, bad faith or overreaching must be established before a lawyer is disciplined

for overcharging (Petition, pp. 11-14). In this case, of course, it was stipulated that Petitioner "acted conscientiously, diligently, and in good faith" in his representation and billing, and that all work billed was actually done (Petition, p. 7a).

(b) The disciplinary rule on which the Court relied allows discipline only when "a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." (Petition, p. 2). The rule itself--not Petitioner, as Respondent argues (Brief in Opposition, pp. 12-13)--made the appraisal of the prudent lawyer crucial, and past decisions confirmed that discipline should not be imposed when responsible attorneys disagreed (Petition, pp. 11-12, 14). In this case both bar officials and ten leading and prudent lawyers stated their astonishment that Petitioner could be subject to discipline (Petition, pp. 7-8, 13-14).

(c) The Massachusetts Court, in contradiction of established Massachusetts authority, held irrelevant the client's acquiescence (Petition, pp. 16-18, 22a). The client had chosen to

retain Petitioner on an hourly fee basis, rejecting flat fees proposed by other lawyers, and had urged Petitioner "to press all reasonable avenues of defense and to pursue the case to trial" (Petition, pp. 3a-5a, 21a). It never has been argued that Petitioner's hourly rate was excessive, and it is stipulated that Petitioner acted "conscientiously, diligently, and in good faith in representing Timothy" (Petition, p. 7a). The Court altered Massachusetts law without notice when it held that a lawyer who vigorously and successfully represented a criminal defendant in such circumstances can be disciplined if a court later decides that he put in too many hours.

(d) Likewise, it was the Court that reinterpreted--i.e., changed--Massachusetts law, which had authorized courts to award lawyers who succeeded several times their hourly charges even though their clients had never agreed to any such fee (Petition, pp. 14-16). In this case, Petitioner used a "creative" and "impressive" argument to suppress breathalyzer results, and then "obtained a not guilty verdict on a serious charge where the facts were heavily stacked against the defense" (Petition, pp. 5a,

13a, 55a). The Court's decision to punish Petitioner thus contradicted previous law governing fees as between lawyer and client. *A fortiori*, the Court's decision contradicted well established law requiring a far more stringent standard for discipline than for fee disputes (Petition, pp. 15-16).

4. This is very far from being, as Respondent argues, a case of a lawyer lacking in "basic professional responsibility" (Brief in Opposition, p. 14). Rather, this is the case of a respected and conscientious lawyer who labored "conscientiously, diligently, and in good faith" (Petition, p. 7a) to represent a criminal defendant who had agreed to pay his hourly time charges and who encouraged him "to press all reasonable avenues of defense and to pursue the case to trial" (Petition, p. 56a), only to find himself punished, after winning the case, because a court later switched retroactively the rules governing lawyers and decided that he had worked too hard.

If it is worthwhile to maintain the independence of the bar, and to protect lawyers who strive conscientiously to follow

the law and provide their clients effective assistance of counsel, this Court should hear this case.

Respectfully submitted,

LAURENCE S. FORDHAM

HENRY P. MONAGHAN
435 West 116 Street
New York, N.Y. 10027
(212) 854-2644
Of Counsel

By: JOHN LEUBSDORF
15 Washington Street
Newark, N.J. 07102
(201) 648-5273
Counsel of Record

DANIEL COQUILLETTE
885 Centre Street
Newton, Mass. 02159
(617) 552-8650
Of Counsel

LAURENCE M. JOHNSON
Mahoney, Hawkes & Goldings
75 Park Plaza
Boston, Mass. 02116
(617) 457-3100
Counsel for Petitioner